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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 778

**CITY OF OAKLAND, ACTING BY AND THROUGH ITS BOARD OF
PORT COMMISSIONERS,**

Appellant,

vs.

**THE UNITED STATES OF AMERICA, UNITED
STATES MARITIME COMMISSION, ENCINAL
TERMINALS, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF CALIFORNIA.**

STATEMENT AS TO JURISDICTION.

W. REGINALD JONES,
Counsel for Appellant.

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**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION**

No. 22002-L

**CITY OF OAKLAND, A MUNICIPAL CORPORATION, ACTING
BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS,**
Petitioner and Appellant.

**UNITED STATES OF AMERICA AND UNITED STATES
MARITIME COMMISSION,**
Defendants and Appellees.

**ENCINAL TERMINALS, HOWARD TERMINAL AND
PARR-RICHMOND TERMINAL CORPORATION,**
Interveners and Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

Pursuant to Rule 12 of the Supreme Court of the United States this statement is made disclosing the basis upon which it is contended that that Court has jurisdiction to review on appeal the final decree rendered by the above entitled Court in the above entitled proceeding.

I.

Statutory Provisions Sustaining Jurisdiction.

Section 210 of the Judicial Code as amended (U. S. Code Title 28, Sec. 47a) provides in its pertinent part, as follows:

"A final judgment or decree of the District Court in the cases specified in Section 44 of this title may be re-

viewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the state. The District Court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse or modify as the case may require the final judgment or decree of the District Court in the cases specified in Section 44 of this title * * * (March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; October 22, 1913, c. 32, 38 Stat. 220).

The appeal likewise is authorized by Title 28, Section 47, U. S. Code, reading in part as follows:

"* * * An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if an appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (October 22, 1913, c. 32, 38 Stat. 220.)

The Shipping Act, 1916 (U. S. Code, Title 46, Sec. 830; 39 Stat. 738) and particularly Section 31 thereof, and the Merchant Marine Act, 1936 (49 Stat. 1985) make the foregoing provisions applicable to decisions of the Maritime Commission. Said Section 31 provides as follows:

"The venue and procedure in the courts of the United States in suits brought to enforce, suspend or set aside in whole or in part, any order of the board, except as otherwise provided for, shall be the same as in similar

suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district courts having jurisdiction over the parties."

II.

The Order Whose Validity Is Involved.

On September 11, 1941, the United States Maritime Commission issued its order effective October 27, 1941, in a proceeding before it entitled "In the Matter of Services, Rates, Charges, Tolls, Rentals, Rules, Regulations, Classifications, Agreements, Acts, Practices and Operations of the San Francisco Bay Area Terminals Named Herein," and numbered Docket 555 in the records of said Commission. Said order, among other things, required this petitioner and appellant as one of the respondents in said proceeding (1) to file with the Commission and to secure its approval of certain municipal leases entered into between this petitioner and appellant and other persons; (2) to abstain from allowing greater periods of free-time within which cargo may be permitted to remain on the wharves operated by this petitioner and appellant than those prescribed by said Commission; (3) to abstain from publishing, demanding or collecting wharf demurrage and wharf storage rates less than the minimum rates prescribed by the Commission in said order; (4) to file with the Commission and keep open for public inspection schedules showing all the rates and charges assessed by this petitioner and appellant.

The order of the Maritime Commission involved is set out in full as an exhibit attached to the Petition and Bill for Injunction filed by this petitioner and appellant in the above-entitled Court.

The present appeal is taken from a decree of the above-entitled Court dismissing petitioner's and appellant's petition and bill to enjoin permanently the enforcement of the aforesaid order of the Maritime Commission.

III.

Date of Decree and of Presentation of Application for Appeal.

The final decree sought to be reviewed was entered on December 1, 1942, in the District Court of the United States for the Northern District of California, Southern Division. The petition for appeal herein is presented this 28th day of January, 1943.

IV.

The Questions Involved Are Substantial.

The questions presented by appellant in this appeal and which were urged on the Maritime Commission from the outset of its hearings in the proceeding above referred to, and which were presented to the above-entitled Court for its consideration, are of vital importance not only to appellant but as well to the appellee Commission itself and other public and private agencies all over the country engaged in the operation of wharves.

The assertion of jurisdiction by the Maritime Commission in this instance marks a reversal of administrative interpretation of the Shipping Act, 1916, that had been adhered to by the administrators of that statute since its enactment. That Congress had concurred in the former interpretation is evidenced by the history of other legislation dealing with the subject matter.

Summarized, it is the contention of this petitioner and appellant:

(1) That Congress cannot constitutionally empower the Maritime Commission to regulate a state agency in the operation of wharves;

(2) That Congress did not intend to empower the Maritime Commission to regulate state agencies in the operation of wharves;

(3) That the Maritime Commission has no jurisdiction over the rates as such of any wharfinger and cannot bestow upon itself such jurisdiction under the guise of denominating them purposes;

(4) That the Maritime Commission has no jurisdiction over storage rates since they are furnished independently of transportation; and

(5) That the Maritime Commission has no jurisdiction to compel petitioner to file with it for approval municipal leases and agreements.

It will thus be seen that aside from the first, the constitutional question, the issues presented deal first with whether or not the Commission has any jurisdiction in the premises, and if so, the extent of its powers. The importance of the first question is manifest. The remaining questions are of importance to the Maritime Commission, for the answers to them will determine to a large extent the Commission's responsibilities in administering the Shipping Act, 1916. The answers, likewise, will inform local public bodies and other persons operating wharves of any duties that may have been imposed upon them by that statute, and the extent to which, if at all, local law has been superseded by the enactment of that statute. It is necessary that the confusion caused by the assertion of jurisdiction by the Maritime Commission be resolved as soon as possible. For example, in the order complained of, the Commission held that a lease entered into between the City of Oakland and Howard Terminal, one of the respondents in the proceeding before the Commission, was not valid until filed with and approved by the Commission as an agreement specified in Section 15 of the Shipping Act, 1916. This conclusion was reached notwithstanding the lease in question was entered into in 1914, two years before the enactment of the Shipping Act.

The assumption of jurisdiction by the Commission thus confronts local public officers with the necessity of determining at their own peril whether their actions are to be guided in a given instance by federal law or by the provisions of the municipal charter or other local law under which they have operated heretofore. If they erroneously decide it one way they subject themselves to the severe penal provisions of the Shipping Act, 1916. If they erroneously decided the other way, they subject themselves to personal liability at the suit of a taxpayer.

The Shipping Act, 1916, does not purport to bring municipal corporations within its purview: The only way any wharfinger, whether a public body or private individual, is brought within the scope of the statute, is by means of the definitions contained in Section 1 of that act, the pertinent provisions of which are as follows:

"The term 'other persons subject to this act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

"The term 'person' includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any state, territory, district, or possession thereof, or of any foreign country."

It must be determined whether or not a state or a state agency is a person within the scope of those definitions.

In considering whether or not a state was included within the definition of the word "person," in another statute the Supreme Court of the United States recently said there was no hard and fast rule in that connection.

"The purpose, subject matter, the context, the legislative history, and the executive interpretation of the

statute are aids to construction which may indicate an intent, by use of the term, to bring state or nation within the scope of the law."

Georgia v. Evans, — U. S. —, 62 S. Ct. 972, 974;
86 L. Ed. 667.

It is the contention that the various factors mentioned by the Supreme Court indicate an intention on the part of Congress not to include governmental bodies as subject to regulation under the Shipping Act.

The question has not been decided by any court except in the instant proceeding.

It is true that in *McNeely & Price Co. v. Philadelphia Piers, Inc.*, 196 Atl. 846, the Pennsylvania court expressed the view that the Maritime Commission had been given such jurisdiction, but this statement was by way of *dicta* only and the court marshaled nothing to support it.

Consequently, the question is still open, is substantial, and should be decided by the Supreme Court.

Independently of whether or not a public body is included within the definition of the word "person", as used in the Shipping Act, 1916, it is next contended that that statute gives the Commission no jurisdiction over the rates as such of any wharfinger whether it be a public body or a private enterprise.

In support of its assumption of power, in this connection the Commission relies upon Sections 16 and 17 of that act.

The material portion of Section 16 reads as follows:

"That it shall be unlawful for any common carrier by water, or other persons subject to this act, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable

prejudice or disadvantage in any respect whatsoever . . .

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense."

Section 17 is in the following language:

"That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

The Shipping Act, 1916, is not plenary. Compared to the Interstate Commerce Act, it is fragmentary. From the necessities of the case very little regulation of foreign vessels, for example, could be accomplished. The structure of the act demonstrates that Congress did not attempt to subject wharfingers to even that much regulation.

Thus, it will be seen that Section 17, dealing with foreign commerce, applies in both its first and second paragraphs to common carriers by water in foreign commerce, whereas, only the second paragraph of that section applies to other

persons. It is significant that the first paragraph deals with rates, and the second paragraph, containing no mention of rates, is concerned with regulations and practices. Significant also is Section 18 of the act which deals with interstate commerce. No mention of "other person" is found in that section. As a matter of fact, of the original forty-four sections in the statute, the phrase "other person" appears only in Sections 15, 16, 17, 20 and 21.

The first paragraph of Section 18 is the only portion of the section here material. As has been stated, the phrase "other person" does not appear in the entire section. That paragraph reads as follows:

"That every common carrier by water in interstate commerce shall establish, observe and enforce just and reasonable rates, fares, charges, classifications and tariffs and just and reasonable regulations and practices relating thereto and to the issuance, form and substance of tickets, receipts, bills of lading, as a matter of presenting, marking, packing and delivering property for transportation, the carrying of personal, sample and excess baggage, the facilities for transportation and all other matters relating to or connected with the receiving, handling, transporting, storing or delivering of such property."

It will be seen that Congress has combined the matter of rates, fares and charges, which appeared in the first paragraph of Section 17, with reasonable regulations and practices which appeared in the second paragraph of that section. From this it is fairly to be inferred that Congress had a reason for dividing Section 17 into two paragraphs and to treat the persons included in the second paragraph in a manner different from those mentioned only in the first.

There are many further considerations to support the proposition that Congress has not intended to give the Commission any jurisdiction over the rates of wharfingers,

and that the Commission should not be allowed to assume such jurisdiction by means of subterfuge.

The question has not been decided by any court, is a substantial one, and should be decided by the Supreme Court.

Even if it were to be assumed that the Commission had jurisdiction over certain rates of wharfingers, it cannot be said to have the power to regulate storage rates. Wharf storage is arranged for independently by the shipper or consignee and the water carrier has no interest in it. It is furnished independently of transportation. Consequently, it is not carried on "in connection with a common carrier by water" within the definition of Section 1 of the Shipping Act. If it is not so carried on it is excluded by definition from the operation of the act. This issue is governed by the principles of *Swift & Co. v. U. S.*, — U. S. —, 62 S. Ct. 948, 956, and the order of the Commission and the decree of the above-entitled Court are erroneous as being in conflict with that decision.

V.

Cases Believed to Support the Jurisdiction.

In *Swayne & Hoyt v. U. S.*, 300 U. S. 297, 57 S. Ct. 478, the question involved was the validity of an order of a predecessor of the appellee Commission in the administration of the Shipping Act, 1916. The appeal was taken from a final decree of the United States District Court for the District of Columbia and the procedure followed was that provided in Sections 47 and 47a, Title 28, U. S. Code.

Since the statutory provision for appeals affecting an order of the Maritime Commission are identical with the case of those involving orders of the Interstate Commerce Commission, the numerous cases in which the Supreme Court has reviewed decisions of the statutory three-judge courts in the latter case are believed to support the juris-

diction in the case at bar. Compare *Baltimore & Ohio R. R. Co. v. U. S.*, 305 U. S. 506.

VI.

Opinion Below.

The District Court of the United States for the Northern District of California, Southern Division, filed its opinion in this case on August 20, 1942, and a copy of the opinion of the Court is appended to this statement as "Exhibit A." •

Dated: January 28, 1943.

Respectfully submitted,

W. REGINALD JONES,
Port Attorney,
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(5018)

• CLERK'S NOTE.—The Opinion of the District Court is printed as an Appendix to the Jurisdictional Statement in the case of *California, et al. v. U. S.*, et al., No. 760, October Term, 1942.